BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. SEAWAY SEMICONDUCTOR, INC., Respondent. ---------- GLORIA A. HENSLEY, Complainant.	Case No. E 95-96 M-1786-00-fpe C 97-98-218 00-03-P DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the discussion of physical disability, found at pages 13 through 19 of the final decision, as precedential, pursuant to Government Code sections 12935, subdivision (h), and 11425.60 and California Code of Regulations, title 2, section 7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent and complainant.

DATED: August 10, 2000

FAIR EMPLOYMENT AND HOUSING COMMISSION

GEORGE WOOLVERSON	HERSCHEL ROSENTHAL
EUIWON CHOUGH	ANNE RONCE

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Hearing Officer Jo Anne Frankfurt heard this matter on January 10 through 14, and January 17 and 18, 2000, in Oakland, California. Mark D. Woo-Sam, Staff Counsel, represented the Department of Fair Employment and Housing. Elliott A. Myles, Attorney at Law, represented respondent Seaway Semiconductor, Inc. Complainant Gloria A. Hensley and respondent representative Myriam Brors attended the hearing.

The parties' post-hearing briefs were timely filed and the matter was submitted on April 10, 2000.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On June 16, 1997, complainant Gloria A. Hensley (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) alleging that, within the preceding year, Seaway Semiconductor, Inc. terminated her employment while she was on disability leave due to her physical disability, Graves' disease, in violation of the Fair Employment and Housing Act (FEHA or Act) (Gov. Code, §12900 et seq.).

2. On February 4, 1998, complainant filed a written, verified amended complaint with the Department alleging that respondent terminated her employment because of her physical disability, in violation of the Act. On April 27, 1998, complainant filed a written, verified amended complaint with the Department alleging that she was denied family care leave and terminated because of her disability, in violation of the Act.

3. The Department is an administrative agency empowered to issue accusations under section 12930, subdivision (h), of the Act. On June 15, 1998, Nancy C. Gutierrez, in her official capacity at that time as Director of the Department, issued an accusation against respondent Seaway Semiconductor, Inc. (respondent Seaway Semiconductor or respondent). The Department's accusation alleged that respondent terminated complainant because of her physical disability, refused to accommodate complainant's physical disability, and failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivisions (a), (k), and (i), respectively.

4. Respondent Seaway Semiconductor is a "wafer foundry" which processes silicon semiconductor wafers. At all pertinent times herein, respondent had two California locations -- the Graham Court facility and the Mines Road facility, both in Livermore. Respondent is an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a), (k), and (i).

5. A wafer is a slice of silicon used to produce semiconductor chips or circuits for purposes of conducting electricity. A wafer foundry is a place where wafers are processed or reprocessed either by placing layers of glass, metal, or other films on the wafer surface, or by removing some or all film layers from the wafer surface. A process technician, also called an "operator," is an individual who operates machines used to process or reprocess wafers.

6. Respondent's wafer foundry utilizes a number of machines and techniques to process or reprocess wafers. These machines and processes include TEOS, Tungsten, photo spinner, poly, wet etch, and nitride.

7. From 1993 through late 1997, Dan Brors was respondent's President and CEO, working primarily at the Mines Road facility. He was only incidentally involved in the day-to-day operations of the Graham Court facility. During that same time period, Myriam Brors, respondent's Corporate Secretary and Vice President of Sales and Marketing, worked primarily at the Graham Court facility and was responsible for the day-to-day operations of that facility.

8. Complainant has worked as an operator in the wafer fabrication industry since 1978. During that period of time, complainant worked for several employers, including Intel, on a variety of machines and with a variety of processes, including the wet etch process and diffusion.

9. On April 17, 1995, respondent hired complainant to work as an operator at the Graham Court facility. Initially, complainant was trained on, and operated, the photo spinner in respondent's "photo" room. Complainant's co-worker Gordon Chisholm then trained her to work on TEOS and another worker, Bill Kliest, trained her to work on Tungsten.

10. From 1996, Cecil Prack was respondent's production manager and worked primarily at the Graham Court facility. At all pertinent times thereafter, Prack was complainant's supervisor. Prack was responsible for, among other things, production scheduling, supervision of operators, conducting performance evaluations, hiring, firing, and making recommendations about raises.

11. In January 1997, complainant's health was not good. Her hands shook, and co-workers asked her why she was shaking. She had bowel movements at least seven to eight times a day, her hair was slowly coming out, and she had gained weight. She also had difficulty breathing when she went to bed in the evening.

12. In January 1997, complainant saw Dr. Andris Lazdins, M.D. Dr. Lazdins ordered thyroid tests, which confirmed that complainant had hyperthyroidism.

13. As a result, in February 1997, Dr. Lazdins prescribed the medication Atenolol to stop complainant's shaking

and her rapid heart rate. Atenolol is a medication designed to calm some of the peripheral effects of hyperthyroidism and Graves' disease –- i.e., rapid heartbeat, shakiness and perspiration.

14. After complainant began taking Atenolol, her symptoms worsened. During the day, she had difficulty breathing and her heart raced when she walked. When cleaning her house, she became "drained" and lightheaded, requiring breaks to recover. She also had trouble breathing when sleeping at night.

15. By March 5, 1997, complainant was operating TEOS 80 to 90 percent of her time at work. As of March 5, 1997, complainant had been trained on TEOS, Tungsten, and wet etch. She also had some knowledge of photo spinner, poly, and nitride.

16. As of March 5, 1997, respondent had given complainant two written performance evaluations. The first evaluation, dated July 17, 1995, stated that complainant was an "overall asset to Seaway Semiconductor" and found that her "cheerful personality and workability make her pleasant to work with." In the second evaluation, dated July 5, 1996, while areas of possible improvement were identified, complainant was found to meet or exceed respondent's expectations in all but one category. Cecil Prack prepared the second evaluation.

17. As of March 5, 1997, respondent had three shifts of operation -- day, swing, and graveyard. Complainant worked full time on the day shift with four other operators. Complainant was willing, however, to work either day or swing shift. During the school year, she actually preferred the swing shift because it was more convenient for taking her children to school.

18. On March 5, 1997, while at work, complainant felt her heart race and she began to shake. Complainant grabbed a door, looked at her supervisor Cecil Prack, who was standing approximately 10 feet away, and called out for help. She then fainted. She awoke to hear paramedics asking her questions, but was unable to answer because her heart was racing and she was gasping for breath. She was taken to Valley Care Hospital in Pleasanton, California.

19. After complainant was taken to the hospital, Cecil Prack turned to employee Mary Flowers and in a hushed voice said, "That scared the shit out of me, Mary. We can't have that happening here."

20. At the hospital, complainant's heart rate was high, despite the fact that she had been taking Atenolol. She was dizzy, short of breath and felt weak. From the hospital, complainant's husband, Doug Hensley, called Cecil Prack. Hensley told Prack that complainant's heart rate was very high, but that it was starting to come down, and they hoped she would be able to come home that day. Hensley also told Prack that complainant's glasses were still at work, and that he would need to pick them up on the way home from the hospital.

21. On the evening of March 5, 1997, Valley Care Hospital released complainant. Dr. Lazdins ordered complainant to remain off work because of the degree of her thyroid-hormone-level elevations, rapid heartbeat, and fatigue.

22. On the way home from the hospital, complainant's husband Doug Hensley picked up her glasses from Cecil Prack, leaving complainant in the car. Prack walked back to the car with Hensley, asked complainant how she was, and said that she had scared him. Prack also told complainant to go home, take care of herself, and not to worry about her job.

23. When complainant and her husband Doug Hensley returned home on March 5, 1997, Hensley helped complainant into bed. That night, Hensley telephoned his mother, Nora Ragosa, and asked her to stay with complainant and care for her.

24. On March 5, 1997, respondent's then Human Resources Manager, Nicole Griffin, recorded on complainant's timecards the words, "OUT ON DISABILITY."

25. Beginning March 5, 1997, co-worker Gina Laird assumed complainant's TEOS duties. Laird continued to perform the TEOS duties full-time on the day shift for about a year.

26. On March 6, 1997, complainant saw Dr. David Bernard, an endocrinologist, who told complainant that she had Graves' disease.

27. Graves' disease, a thyroid condition that causes hyperthyroidism, results when the immune system triggers the thyroid gland to produce an excess of the thyroid hormone. The resultant hyperthyroidism, an overactive thyroid, can manifest the following symptoms: speeding up or causing irregularities in heart rate, raising blood pressure, weakening of heart muscle and heart palpitations; tremulousness (shakiness in the hands) and nervousness; weight fluctuation; heat intolerance; increased perspiration; and, increased bowel movements. Hyperthyroidism

can interfere with a number of activities, including the ability to breathe, walk, and sleep.

28. If left untreated, hyperthyroidism can cause a condition called “thyroid storm,” where an individual becomes very ill. “Thyroid storm” can result in a high fever, blood pressure dropping, and, although rare, death.

29. The thyroid gland is part of the endocrine system, and can affect other bodily systems, including the cardiovascular, digestive, reproductive, and nervous systems.

30. Graves’ disease is often first treated with radioactive iodine, but this treatment was not initially prescribed for complainant because her “uptake was low.” Instead, Dr. Bernard prescribed propylthiouracil (P.T.U.), a medication that can decrease the production of the thyroid hormone. P.T.U. does not, however, take effect immediately and, depending on the individual patient, may not become effective for one to three months. It may also cause side effects, such as hives, rashes, and agranulocytosis (a very low white blood cell count), which may require discontinuance of the medication.

31. On or about March 6, 1997, complainant also began taking Xanax, a tranquilizer. Xanax helps to calm racing thoughts and anxiety, helps improve concentration, and treats sleeplessness.

32. For the week following her fainting, complainant slept a lot and was unable to perform most physical activities. During this time, tasks as simple as sitting up drained complainant’s energy, causing her heart to race and her to gasp for air. Nora Ragosa, complainant’s mother-in-law, stayed with complainant during that week, watching over complainant and performing such tasks as cooking meals, cleaning, and caring for the children. Two weeks after fainting, complainant still experienced difficulties, needing to rest for approximately 30 minutes after making her bed. Thereafter, complainant continued to have difficulty, needing a 15-minute break after one hour of doing household tasks such as making beds, doing dishes, picking up after her children or cleaning.

33. On or about March 13, 1997, Cecil Prack called complainant at home and asked how she was feeling. Complainant told him that she was doing better, and Prack said that she had scared him. Prack stated that he had been worried, that complainant should take care of herself, and told her not to worry about her job because it would be there when she got better. Prack asked complainant why she had fainted. She told

Prack that she had Graves' disease, explaining that she had a "fast thyroid" which caused her heart to race, her hands to shake and her hair to fall out. When complainant told Prack that she wanted to know more about Graves' disease, Prack offered to do an internet search. Prack also asked complainant if her condition was treatable and she told him that that she had been prescribed medication for the disease.

34. On or about March 20, 1997, Cecil Prack again called complainant at home. During this conversation, Prack asked complainant to put her doctor in touch with Prack, saying he wanted to speak with the doctor before complainant returned to work. Complainant agreed to speak to her doctor and inform him that Prack wanted to talk with him. Prack reassured complainant that her job would be there when she was better.

35. Around two weeks after complainant fainted on the job, Cecil Prack and Myriam Brors decided to terminate complainant's employment. The idea to terminate complainant's employment originated with Prack, and Brors "went by what Cecil [Prack] told" her.

36. On March 21, 1997, Dr. Lazdins completed an Employment Development Department "Request for Additional Medical Information" form. On the form, Dr. Lazdins specified April 21, 1997, as an estimated date for complainant's return to work.

37. On or about March 26, 1997, Dr. Lazdins saw complainant, who had hives and a rash resulting from her medication, P.T.U. Dr. Lazdins concluded that complainant had an allergic reaction to P.T.U. After consulting with Dr. Bernard, Dr. Lazdins changed complainant's medication to Tapazole, a similar medication. Complainant did not tolerate Tapazole either, as her rash and hives worsened.

38. On or about April 14, 1997, Cecil Prack hired Massey Lee to work as a production supervisor for the operators. Prack was Lee's supervisor. Because complainant was on leave at the time Lee was hired, Lee did not know complainant.

39. Within Massey Lee's first week on the job, Cecil Prack discussed plant personnel with him, including the operators' duties, capabilities and performance. Prack told Lee that complainant was "a nice lady" who was "not here right now, she has some medical issues," and he was "working on it." Prack did not discuss complainant's job performance or the machines and processes complainant operated. Prack did discuss with Lee

problems with the work performance of another operator, Jerri Goodman.

40. At some point in or after April 1997, respondent transferred operator Jerri Goodman from graveyard to swing shift because of Goodman's performance problems. Goodman, who worked oxidation, lacked the capability to do that without supervision. Respondent transferred Goodman to the swing shift so that she would receive more help. Notwithstanding the problems with her performance, respondent did not terminate Goodman.

41. As of April 1997, three or four of respondent's operators, including Jerri Goodman, were qualified to work in only one process area.

42. In or about April 1997, respondent considered adding a weekend shift because the amount of work was increasing. Shortly after respondent hired Massey Lee, Cecil Prack spoke with Lee about "picking up" more people for a weekend shift so that respondent could become a seven-day operation.

43. During the time complainant worked for respondent and thereafter, respondent allowed operators to transfer between shifts. Either respondent or the operator initiated the transfers. In general, respondent sought volunteers among existing staff to fill vacancies before hiring new employees.

44. As of April 18, 1997, while there had been some lessening of her symptoms, complainant still had Graves' disease. She had not been successfully treated for it, as she was unable to tolerate either P.T.U. or Tapazole.

45. Notwithstanding the ineffectiveness of her medication, as of April 18, 1997, complainant hoped that her condition would stabilize and that her doctor would release her to return to work. Complainant did not like being at home and preferred to be working. She tried to follow her doctor's directions and take care of herself, awaiting the time when she would be working again. Her husband and children assisted her by not allowing her to exert herself and by helping her with the household chores, something that her husband had not done prior to complainant's fainting. Even with these precautions, on occasion complainant's heart still raced and she became breathless.

46. On April 18, 1997, complainant received another telephone call from Cecil Prack. After asking how she was feeling, Prack said he had heard that complainant planned to

return to work. Complainant informed Prack that this information was wrong, but that she had an upcoming doctor's appointment and was hoping to be released to work. Prack then told complainant not to bother coming back to work because her job was no longer there. Complainant then said, "Excuse me? I didn't hear you right." Prack repeated himself, stating, "Don't come back to work. You don't have a job here." Complainant began to cry, saying she could not understand how this happened, given Prack's previous assurances about her job security. Complainant asked Prack why he had terminated her and Prack merely reiterated that her job was no longer there. Complainant asked Prack again why she had been terminated and he said it was not his "fault" that complainant had gotten "sick." Complainant continued to cry and state she could not understand this in light of Prack's previous assurances. Prack again stated that complainant did not have a job and that she should not come back to work.

47. On April 18, 1997, Cecil Prack terminated complainant's employment with respondent.

48. At all pertinent times herein, respondent's employee handbook contained a progressive discipline policy, which included verbal warnings, written warnings and suspensions. Respondent never gave complainant any verbal or written warning, suspension or other progressive discipline, formal or informal, concerning her work performance.

49. In March 1997, complainant had been earning $13.65 per hour and was a full-time, forty (40) hour per week employee for respondent.

50. After the April 18, 1997, telephone call from Cecil Prack, complainant became "hysterical," was "shaking all over," and began sobbing. Complainant began breathing very rapidly and she felt as if she had "just run a marathon." Her heart raced, she was gasping for air, and she could not stand up.

51. Complainant's mother-in-law, Nora Ragosa, was at complainant's house when complainant received the April 18, 1997, telephone call from Cecil Prack. Ragosa heard complainant say, "Why are you doing this to me? I can't believe this." Complainant's mother-in-law drove complainant to her doctor's office, where complainant received a sedative. After returning from the doctor, complainant was "shaky" and continued to have trouble breathing. Complainant stayed in bed, crying and remaining upset all evening. It appeared to complainant's

husband that complainant was having a “total relapse” and to complainant’s mother-in-law that complainant was a “total mess.”

52. As a result of her termination, complainant felt as though her world had fallen apart. Complainant also felt hurt and degraded. She cried a lot. As she cried and thought about the situation, her heart raced and she shook. She worried about losing her house, disappointing her children, and distressing her husband. Complainant worried about not being able to contribute to the family income and she feared that her family would lose everything. She felt as though she had failed everyone.

53. On April 21, 1997, complainant went to her worksite at the Graham Court facility to turn in her keys and clean out her locker. She also wanted to find out why she had been terminated. At the worksite, complainant initially spoke with Dan Brors, respondent’s President and CEO, who told her that he did not know that she had been terminated but that she should speak with Cecil Prack. Complainant then went to Prack’s office and asked him to read portions of respondent’s employee handbook on disability. Prack laughed, saying that he could read it but complainant still would not have a job. Prack’s laughter upset complainant and made her cry. While crying, she again asked Prack why her employment had been terminated. Prack laughed and said, “It wasn’t my fault you got sick.” This made complainant angry and hurt and she began shaking. Complainant left the building and sat in her car for approximately a half-hour, crying and angry. Complainant then drove home, where she continued to cry. At home, complainant remained hurt and angry. Her heart raced and she had difficulty breathing. She gasped for air, and felt lightheaded.

54. On April 20, 1997, complainant spoke with Dr. Lazdins by telephone, and she had an appointment with him on April 22 or 23, 1997. Since her last visit on March 26, 1997, complainant’s thyroid condition had worsened. Her thyroid still had not stabilized and, as a result, Dr. Lazdins believed she should not yet be released to work. Complainant had an elevated heart rate and her hives had become worse. Complainant also was very anxious, upset, and distraught as a result of her termination. Complainant was instructed to discontinue her use of Tapazole, because of her intolerance to it, and Dr. Lazdins also increased her dosage of the tranquilizer Xanax.

55. At some point between April 1997 and the summer of 1997, respondent began to operate a weekend shift.

56. In the weeks following her termination, complainant felt very distressed and despondent. She continually talked about her termination and felt betrayed by respondent. She became irritable, and was not the "bubbly" person she had been previously.

57. In or about July 1997, respondent hired four new operators. Initially, each of the four operators ran only one process and did not know how to operate any other processes.

58. On or about July 15, 1997, Dr. Lazdins released complainant to return to work.

59. On July 27, 1997, complainant began working on the swing shift at a company called Process Specialties, in the "photo" room. In that position, complainant performed work similar to the work she had done in respondent's photo room. While working at Process Specialties, complainant continued to doubt herself and her abilities. She worried about whether she was doing a good job. She also feared that disclosure of her medical condition could lead to adverse consequences. When she needed some leave for a medical procedure, she was "scared to death" that her employment would be terminated. Complainant worked at Process Specialties until November 1999, when she was laid off due to lack of work.

60. Complainant received two radioactive iodine treatments for her thyroid gland. One of the treatments occurred in or around June 1997. In or around September 1997, the treatments resulted in complainant's condition changing from hyperthyroidism to hypothyroidism. Hypothyroidism is a low thyroid condition that commonly results from the radioactive iodine treatment. Complainant will continue to have hypothyroidism for the rest of her life and will require thyroid replacement medication throughout.

61. As of the date of hearing, complainant continued to experience the emotional effects of her termination from respondent. Complainant continued to doubt herself. Her personality and behavior had changed, and she was not as cheerful as she had been prior to the termination. She had also become fearful about being wrongfully treated in the workforce. In her personal life, she had discontinued working in her garden, an activity she had previously loved. The termination also remained a source of tension in her family. She argued with her husband when they talked about her termination, and yelled at her children.

62. Since her termination, complainant has preferred to keep information about her medical condition to herself. As of the date of hearing, she was fearful of disclosing information about her health to people, even her husband.

63. As of the date of hearing, complainant was unemployed and had hypothyroidism.

DETERMINATION OF ISSUES

Liability

FEHA provides that it is an unlawful employment practice for an employer to discharge an employee from employment because of the employee's physical disability, unless excused by a lawful defense. (Gov. Code, §12940, subd. (a).)

The Department asserts that respondent terminated complainant because of her physical disability, Graves' disease and hyperthyroidism, in violation of Government Code section 12940, subdivision (a). Respondent asserts that complainant does not have a disability within the meaning of FEHA and also argues that complainant's Graves' disease and hyperthyroidism had nothing to do with her termination.

A. Physical Disability

Government Code section 12926, subdivision (k), states in part:

> "Physical disability" includes, but is not limited to, all of the following:
>
> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
>
> (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits an individual's ability to participate in major life activities.

Government Code section 12926, subdivision (k)(4), also defines "physical disability" as "[b]eing regarded as having or having had" such a disease or disorder. (Gov. Code §12926, subd. (k)(4).)

The Department argues that complainant's thyroid condition -- hyperthyroidism and Graves' disease leading to hypothyroidism -- is a "physical disability" within the meaning of FEHA. In the alternative, the Department argues that respondent perceived complainant as having such a disability. Respondent asserts that complainant does not have either a real or perceived disability, arguing that complainant's condition was "treatable" and did not impair her ability to work.

Respondent relies upon federal court cases brought under the Americans with Disabilities Act (ADA)(42 U.S.C. §12101 et seq.) on the issue of corrective or mitigating measures. Interpreting the ADA, the United States Supreme Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment." (Sutton v. United Airlines, Inc. (1999) 527 U.S. 471, at p.__ [119 S.Ct. 2139, at p. 2143] (hereafter Sutton).) The Sutton Court further held that, "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures –- both positive and negative –- must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [Americans with Disabilities] Act." (Sutton, supra, 527 U.S. 471, at p.__ [119 S.Ct. 2139, at p. 2146].)

Citing Sutton, respondent argues that complainant's condition is fully treatable, and, as such, is not a disability. In Sutton, however, the United States Supreme Court stated that the "use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability . . . if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity." (Sutton, supra, 527 U.S. 471, at p.__ [119 S.Ct. 2139, at p. 2149].) The fact that medication may lessen the symptoms of an impairment does not, alone, prevent a finding that the impairment is a disability. The Sutton Court referred to the situation in which medication proved to be ineffectual in curing an impairment, and recognized that medicine may "lessen the symptoms of an impairment so that [the individual] can function but nevertheless remain substantially limited." (Ibid.) Thus, the

mere fact that a condition is treatable does not prevent it from being a disability.

To date, no California court has directly addressed the impact, if any, of the Court's ruling in Sutton on interpreting FEHA. Congress, however, has expressly provided that the ADA does not limit any state law that affords equal or greater protection than the ADA.1/ This is consistent with the Legislature's uncodified intent language, when amending the disability provisions of FEHA:

> It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act (Public Law 101-336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990. (Stats. 1992, c. 913, §1 (A.B. 1077).) (See Historical Note, West Ann. Bus. & Prof. Code (1990 ed.) §125.6 (2000 pocket supp.) p.19.)2/

Because California law differs from the ADA in significant ways,3/ the question of whether complainant has a "physical disability" must be evaluated under FEHA, and not the

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1/ The ADA provides, "Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this [ADA] Act. (42 U.S.C. §12201, subd. (b).)

2/ Court decisions, particularly in the area of "mental disability," have differed in the degree to which they have found cases under the ADA useful when interpreting FEHA. (Compare e.g., Pensinger v. Bowsmith (1998) 60 Cal.App.4th 709, pp. 719-22 with Muller v. Automobile Club of Southern California (1998) 61 Cal.App.4th 431, pp. 443, n.6; see also Swenson v. County of Los Angeles (1999) 75 Cal.App.4th 889; review granted Jan. 13, 2000 SO83916.)

3/ For example, the plain language of FEHA differs from the ADA. See, e.g., the FEHA statutory language referenced infra, notes 4 and 9.

ADA. Applying the FEHA definition in this case, the record established that complainant has met both prongs of Government Code section 12926, subdivision (k)(1). Complainant's thyroid condition –- hyperthyroidism and Graves' disease –- is a condition or disorder that affects a number of body systems, including the endocrine, cardiovascular and digestive systems. Thus, the Government Code section 12926, subdivision (k)(1)(A) prong is met.

Complainant's condition also "limits"4/ her ability to participate in a number of major life activities, including breathing, walking, and sleeping, under Government Code section 12926, subdivision (k)(1)(B). The record showed that in January 1997, complainant had breathing problems, shaking spells, frequent bowel movements, hair loss, and weight gain. Thereafter, despite taking her prescribed medication, complainant continued to have difficulty breathing and her heart raced when she walked. She also became "drained" and lightheaded when doing household tasks and had more trouble breathing when she tried to sleep at night. By March 5, 1997, complainant's condition worsened to the point where she lost consciousness at work, and was hospitalized.

At the hospital, complainant's heart rate was high. She felt dizzy, short of breath, and weak. Upon her release from the hospital, complainant experienced significant hardship when performing most physical activities. For example, after making her bed, she needed to rest for approximately 30 minutes. Thereafter, during her leave, complainant was unable to tolerate corrective medications, had difficulty breathing and had a rapid

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4/ The term "limits" is not expressly defined in FEHA. As commonly defined, the term connotes something that restricts or confines. (American Heritage Dictionary, (2nd college ed. 1982) p. 732.) Similarly, Black's Law Dictionary defines "limit" as "[t]o abridge, confine, restrain and restrict." (Black's Law Dict. (5th ed. 1979) p. 834.)

By contrasting the plain language of the definitional provisions of the ADA with FEHA, the term "limits" in FEHA provides a less onerous standard than the federal definition of disability, which requires that an impairment "substantially limit" a major life activity to qualify as a disability under the ADA. (42 U.S.C. §12102(2)(A)(emphasis added).)

heart rate. After her termination, complainant's symptoms worsened. Thus, based upon the record, complainant's condition plainly limited her ability to participate in a number of major life activities within the meaning of Government Code section 12926, subdivision (k)(1)(B).5/

Nonetheless, in its closing brief, respondent argues that a physical condition does not fall within the protection of FEHA when a complainant is physically able to work in his or her profession, despite his or her condition. This argument only makes sense in one context –- when the complainant asserts that he or she is limited in the major life activity of working.6/ In this case, however, the Department does not claim that

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5/ Because complainant's medication had not corrected her condition, and, as a result, she experienced significant limitations in her ability to perform major life activities such as breathing and walking, complainant can be considered disabled even under the ADA. (See Barnett v. Revere Smelting & Refining Corp. (1999) 67 F. Supp.2d 378, at p. 390 [post-Sutton case where plaintiff's chest pain and breathing difficulty resulting from his heart condition continued after he took medication; court concluded that the "critical inquiry" was "whether the individual's life activity remains substantially limited once the corrective measure is implemented."])

The record in this case shows that when respondent terminated complainant's employment, she had significant adverse effects from her medication, resulting in an inability either to stabilize or effectively treat her condition. At the time of complainant's termination, her condition had not been successfully "treated" by any of the corrective measures prescribed by complainant's physicians. As a result, she remained substantially limited in the major life activities of breathing and walking.

6/ To apply respondent's argument more broadly -– i.e., to eliminate all claims when the complainant is able to work –- would eviscerate the legal protections for disabled workers. Indeed, both FEHA and the ADA were designed to protect disabled individuals who are able to work but, because of misplaced stereotypes or prejudice, have been denied employment opportunities. (42 U.S.C. §12101; Gov. Code §§12920 and 12921.)

complainant was limited in the major life activity of working. Instead, as discussed above, complainant was limited in other major life activities of breathing, walking and sleeping.7/ Thus, respondent's argument is misplaced.8/

Accordingly, complainant's thyroid condition constitutes an actual "physical disability" within the meaning of Government Code section 12926, subdivision (k)(1)(A) and (B).9/ In light of this conclusion, this decision need not

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7/ Even under federal law, there is no need to determine whether an individual is substantially limited in working if that individual is substantially limited in any other major life activity. (29 C.F.R. pt. 1630, App. §1630.2(j) (1998).)

8/ Respondent additionally asserts that the period "before [complainant's] present condition stabilized" was temporary, similar to appendicitis or influenza, and not covered by FEHA. This argument is not compelling because the record showed that at all pertinent times herein, complainant had an abnormal thyroid and, as of the date of hearing, complainant had hypothyroidism, a permanent thyroid condition resulting from radioactive treatment of her Graves' disease.

9/ Government Code section 12926, subdivision (k)(4), also states that "physical disability" "shall have the same meaning as the term 'physical handicap' formerly defined by this subdivision and construed in American National Ins. Co. v. Fair Employment & Housing Com. 32 Cal.3d 603." (Gov. Code, 12926, subd. (k)(4).) In American National Ins. Co., (1982) 32 Cal.3d 603, the California Supreme Court found that high blood pressure was covered under FEHA's definition of "physical handicap." The Supreme Court held that, for purposes of coverage under FEHA, a "physical handicap" includes any physical impairment which is disabling in that it makes "achievement unusually difficult." (Id. at pp. 608-10.) Here, complainant's physiological condition, which affects the endocrine system, made "achievement unusually difficult" because the condition interfered with, among other things, complainant's breathing, walking, and sleeping.

reach the question of whether complainant had a perceived disability.10/

The Department established that complainant's hyperthyroidism and Graves' disease, which led to hypothyroidism, constitutes a physical disability within the meaning of FEHA.

B. Discrimination

Discrimination is established if a preponderance of the evidence demonstrates a causal connection between complainant's physical disability and her termination by respondent. The evidence need not demonstrate that complainant's physical disability was the sole or even the dominant cause of her termination. Discrimination is established if disability was one of the factors that influenced respondent. (DFEH v. Silver Arrow Express, Inc. (1997) FEHC Dec. No. 97-12, at p. 6 [1997 WL 840029; 1997 CEB 2]; DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at p. 5 [1988 WL 242635; 1988-89 CEB 4].)

Here, the preponderance of evidence established that complainant's disability was a factor in respondent's termination of complainant. On April 18, 1997, Cecil Prack terminated complainant's employment, despite his previous assurances that she need not worry about her job. When complainant asked why she was being terminated, Prack told her that her job was no longer there and said that it was not his "fault" that complainant had gotten "sick." Prack reiterated these comments when complainant returned to work to turn in her keys.11/

10/ Nonetheless, the Department's position that respondent perceived complainant as having a disability within the meaning of FEHA has merit. (See Cassista v. Community Foods (1993) 5 Cal.4th 1050.) The evidence showed that respondent knew complainant had Graves' disease. Complainant told Cecil Prack that she had Graves' disease, explaining that it was a "fast thyroid" which caused her heart to race, hands to shake, and hair to fall out.

11/ Respondent asserts that Prack's statements are inadmissible hearsay. Prack's statement that it was not his "fault" that complainant had gotten "sick" is non-hearsay, however, because it is not offered for the truth of the matter asserted -- i.e., that Prack was not responsible for

[continued. . .]

These facts show that complainant's disability was a motivating factor in respondent's termination of complainant. During his conversations with complainant, Cecil Prack's focus was on complainant's physical condition. And, when complainant asked why she was fired, Prack connected complainant's job loss to her disability. Prack's response to complainant's inquiry was that her job was no longer there and it was not his "fault" she had gotten "sick."

Respondent argues, in its closing brief, that complainant was an at-will employee, whom respondent could discharge without cause as long as the discharge "did not violate a minimum statutory standard." An employer, however, cannot terminate an employee in violation of FEHA, notwithstanding the employee's at-will status. (See Gov. Code §§12926 and 12940.)

Respondent also denies that complainant's disability played any role in its decision to terminate complainant, asserting that other factors prompted the termination. In its written response to the complaint in this action, respondent avers it terminated complainant because she was not completely "cross-trained" and that from April 1997, no position existed for an operator who was not completely cross-trained. Later, largely through Myriam Brors' testimony at hearing and in its closing brief, respondent advances numerous additional reasons for the termination: the day shift was "top heavy;" complainant

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complainant's getting sick. Rather, the statement is relied on as evidence of Prack's state of mind -- his attitude towards complainant's disability in connection with complainant's termination. (Smith v. Whittier (1892) 95 Cal. 279; Jefferson's Cal. Evid. Benchbook, (3d ed. 1999) §1.34, p. 25.) Moreover, Prack was a managing supervisor who hired and fired employees, and his statement about complainant's termination was within the scope of his authority and, therefore, an authorized admission. (Paramount Productions v. Smith (9th Cir. 1937) 91 F.2d 863, cert. den. 1937) 302 U.S. 749; O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal.App.4th 563, rehg. Den. (1997) review den. (1997).) Thus, the statements are admissible, both as non-hearsay and as an exception to the hearsay rule.

was slow and lazy; complainant was disruptive; complainant used foul language; and, complainant had a bad attendance record.

The record did not establish that these reasons played a role in the decision to terminate complainant's employment. For example, while respondent asserts that complainant lacked "cross-training," the record contains multiple and somewhat conflicting definitions of that term. In any event, the record established that complainant could operate at least two processes (TEOS and Tungsten) and was at least as skilled as some other operators who were either retained or hired after complainant's employment was terminated.12/

The record contained illuminating testimony about the decision to terminate complainant's employment. Myriam Brors testified, "The trigger [for complainant's termination] was Cecil [Prack] telling me that that's something he wanted to do" and "I went by what Cecil [Prack] told me."13/ Myriam Brors' testimony also makes clear that the decision to terminate complainant was made when complainant was on leave for her disability, stating, "We didn't really decide to terminate Gloria until she was off" "somewhere around" two weeks after complainant fainted at work.14/ The fact that the decision to

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12/ Similarly, respondent's assertion that it wanted to eliminate a "top heavy" day shift is not borne out. The record shows that at the time complainant's employment was terminated, respondent's workload was increasing and respondent was considering adding a weekend shift. If respondent wanted fewer operators on the day shift, it could have sought volunteers from existing staff to transfer to another shift. Indeed, Myriam Brors testified that such an approach was used to fill vacancies on shifts. Complainant testified that she was willing, and to some extent might have preferred, a transfer to the swing shift. The evidence also showed that several operators had been allowed to transfer between shifts before and after complainant's termination.

13/ This is also confirmed by other testimony. For example, Brors admitted that she did not personally review respondent's production logs or attendance records.

14/ At hearing, Brors conceded that her only personal observation during that two week period was that the work place was less disruptive. While the record was conflicting on the nature of complainant's professional

[continued. . .]

terminate complainant was made while complainant was on leave, and around the time that Prack learned that she had Graves' disease, is suspect.

Notwithstanding that the decision to terminate complainant was made around two weeks after complainant fainted at work, Myriam Brors testified that six months prior to that decision, respondent had talked about the day shift being "top-heavy" and the possibility of terminating complainant. During this six-month period, however, neither Myriam Brors nor Cecil Prack raised with complainant any of the concerns respondent now puts forward as reasons for complainant's termination. Moreover, the record shows that after complainant fainted at work, no one from respondent told her about any problems with either her work performance or of any day shift "overload." To the contrary, Prack repeatedly assured complainant during her leave that she should not worry about her job because it would "be there" when she was well. When, to her surprise, Prack terminated complainant, she expressly asked him why she was being terminated. In response, Prack never mentioned or discussed any of the reasons now asserted by respondent. In fact, as discussed above, Prack did not give any reason for the termination, other than that her job was no longer there and it was not his "fault" that complainant had gotten "sick."

Further, respondent's employee handbook states that respondent has a "system of progressive discipline" that includes verbal warnings, written warnings and suspensions. Since complainant's written evaluation in July 1996, she did not receive any warnings, reprimands or discipline. And, during the time complainant was on leave, respondent never warned or suspended complainant for any of the now-alleged behavior.15/

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demeanor, the record showed that everyone in the workforce had their "ups and downs" with co-employees. And, co-employee Gordon Chisholm credibly testified that complainant was liked and was friends with everyone who worked for respondent. Even Cecil Prack had stated to Massey Lee that complainant was a "nice lady."

15/ While respondent's progressive discipline system is not "formal," respondent failed to provide <u>any</u> progressive discipline, formal or informal, or otherwise inform complainant of performance problems after her 1996 evaluation.

In addition, Cecil Prack failed to discuss complainant's alleged performance problems with supervisor Massey Lee. Several days before complainant's termination, Prack met with Lee, a supervisor hired after complainant went on leave, to discuss the status of respondent's operators. During that conversation, Prack said that complainant was on leave due to health problems and "he was working on it." Lee testified that Prack never mentioned any problems with complainant's work performance. To the contrary, during that conversation, Prack described complainant as a "nice lady" and told Lee about another operator's job-related performance problems. Several days later, Prack terminated complainant, but did not similarly fire the other employee who, instead, was transferred to another shift where she would have more help.

In light of the foregoing, respondent's purported "other reasons" for complainant's termination are not persuasive.16/

In conclusion, the evidence showed that respondent terminated complainant because of her physical disability,17/ in

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16/ Myriam Brors' testimony conflicted with other more credible witnesses, including Dan Brors and complainant. For example, Myriam Brors testified that she had forewarned then-President Dan Brors about complainant's termination and told him the reasons for the termination –- i.e., that complainant was slow, lazy, not cross-trained, disruptive and had attendance problems. When questioned at hearing, however, Dan Brors denied knowing any of the reasons for complainant's termination. He testified, "As I told you earlier, I never did learn of the reasons of [sic] her termination." Dan Brors' testimony is consistent with complainant's account of events. Complainant testified that when she talked to Dan Brors on April 21, 1997, Brors told her that he did not know why she had been terminated and that she should speak to Cecil Prack about it.

17/ Government Code section 12940, subdivision (a)(1), provides that it is not unlawful for an employer to discharge an employee with a physical disability where the employee, because of his or her physical disability, is unable to perform his or her essential duties, even with reasonable accommodation, or cannot perform those duties in a manner which would not endanger his or her health or safety or the

[continued. . .]

violation of Government Code section 12940, subdivision (a).18/

Remedy

Having established that respondent discriminated against complainant in violation of FEHA, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of such discrimination. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code §12970, subd. (a); Cal. Code of Regs., tit.2 §7286.9; DFEH v. Madera County, (1990) FEHC Dec. No. 90-03 [1990 WL 312871; 1990-91 CEB 1 at p.27].) The Department seeks an order of back pay and actual damages for complainant's emotional distress.19/

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health and safety of others even with reasonable accommodation. The employer has the burden of proving this defense by a preponderance of the evidence. (Raytheon Co. v. FEHC (1989) 212 Cal.App.3d 1242, at p. 1252; Sterling Transit Co. v. FEPC (1981) 121 Cal.App.3d 791, at p. 798.) Respondent has not asserted this defense.

18/ The Department's amended accusation alleged that respondent denied complainant reasonable accommodation for her physical disability, in violation of Government Code section 12940, subdivision (k), and failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (i). Respondent denies these allegations.

The Department's post-hearing brief did not directly argue either theory, and this decision does not address whether respondent violated these provisions.

19/ The Department prayed for the imposition of an administrative fine in its accusation but did not request such fine in its closing brief. No administrative fine will be ordered.

The Department argued for an award of front pay at hearing, but did not request front pay in its closing brief. Here, the record does not substantiate an award of front pay and no such relief shall be ordered.

A. Back Pay

The Department contends that complainant is entitled to back pay for thirteen weeks –- the period between complainant's April 18, 1997, termination and July 27, 1997, when complainant began work at Process Specialties. Respondent asserts that complainant was not released to return to work by her doctor until July 15, 1997, and therefore any back pay to which complainant is entitled should not begin to accrue until after that date.

Respondent's assertion is correct. Complainant's doctor did not release her to return to work until July 15, 1997. She began working at Process Specialties on July 27, 1997, twelve days later. As noted by the respondent, this period included eight regular workdays. At the date of her termination, complainant earned $13.65 an hour for an eight-hour day. Thus, her lost wages are $873.60 ($13.65 x 8 hours per day x 8 days.)

Complainant will thus be awarded $873.60 in back pay. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date the earning accrued until the date of payment. (Code of Civ. Proc., §685.010.)

B. Damages for Emotional Distress

The Department requests that respondent be ordered to pay complainant $40,000 as damages for emotional distress, pain, suffering, and humiliation. At the time of the acts alleged herein, the Commission had the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non pecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).)20/

In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the

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20/ Effective January 1, 2000, the Legislature raised the $50,000 limit for emotional distress/administrative fines in employment cases to $150,000 per complainant per respondent. (Gov. Code, §12970, subd. (a)(4).)

Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, §12970, subd. (b); DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at pp. 8-10 [1988 WL 242635; 1988-89 CEB 4].)

Respondent's termination of complainant's employment had both immediate and long-term adverse effects on complainant, as described in the findings of fact. Immediately prior to her termination, complainant looked forward to returning to work, bolstered by Cecil Prack's assurances that she need not worry about keeping her job. Prack's strikingly contrary action –- terminating complainant's employment -- resulted in complainant becoming "hysterical" as she sobbed and shook "all over." The termination also took a physical toll –- complainant's heart raced, she gasped for air as if she had "just run a marathon," and could not stand up, as "things just . . . [kept] spinning." Her husband, who felt complainant was having a "total relapse" and her mother-in-law, who testified that complainant was a "total mess," corroborated complainant's immediate distress.

Complainant's physician, Dr. Lazdins, also corroborated her emotional distress. He testified that during complainant's April 1997 visit, complainant was anxious, distraught, and upset as a result of respondent terminating her employment. Dr. Lazdins increased complainant's dosage of Xanax, a tranquilizer, to relieve "the degree of anxiety she was experiencing and to make her a little more comfortable." During this visit, Dr. Lazdins also found that complainant's physical condition had worsened. He attributed this to a combination of complainant's firing and the trouble she was having with the Tapazole medication. Dr. Lazdins testified that complainant's hives, a side effect associated with taking Tapazole, were aggravated because complainant was emotionally upset over her termination.

In the weeks following her termination, complainant remained distressed and despondent, continually talking about the termination and feeling betrayed by respondent. Complainant's self-esteem plummeted, she felt worthless and a failure. Complainant continued to be plagued by self-doubt after she started her new job at Process Specialties, fearing

that she would be fired by her new employer and terrified of telling that employer about some leave she needed.

As of the date of hearing, complainant experienced continuing effects from her termination. Her personality had changed, as she had become less cheerful and continued to experience self-doubt. She remained fearful of being wrongfully treated in the workplace, and did not engage in activities, such as gardening, which she used to enjoy. When talking about the termination with her husband, an argument usually ensued and complainant sometimes yelled at her children following these discussions. Complainant also had become more secretive about her medical condition, fearing that telling people about it would have adverse consequences.

Respondent argues that some of complainant's emotional distress may be attributed to either her diagnosis or her medications. This decision takes that into account in determining the emotional distress damages in this case. Therefore, considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), respondent will be ordered to pay complainant $35,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

ORDER

1. Within 60 days of the effective date of this decision, respondent Seaway Semiconductor, Inc. shall pay to complainant Gloria A. Hensley back pay in the amount of $873.60 for lost wages for the period from July 15, 1997, through July 26, 1997. Respondent shall also pay ten percent per year interest on this amount, running from the date the earnings accrued, and compounded annually, until the date of payment.

2. Within 60 days of the effective date of this decision, respondent Seaway Semiconductor, Inc. shall pay to complainant Gloria A. Hensley compensatory damages for emotional distress in the amount of $35,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

3. Within 70 days after the effective date of this decision, an authorized representative of respondent Seaway Semiconductor, Inc. shall, in writing, notify the Department and the Commission of the nature of its compliance with paragraphs one and two of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: July 5, 2000

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JO ANNE FRANKFURT
Hearing Officer